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7 505 SFD, LLC,
8 Plaintiff,
9 v.
10 FEDERAL DEPOSIT INSURANCE
11 CORPORATION,
12 Defendant.
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Case No. 24-cv-01751-SI

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28 **ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS**

Re: Dkt. No. 21

Now before the Court is defendant's motion to dismiss plaintiff's claims for rent abatement, attorney's fees, and prejudgment interest. Dkt. No. 21. Pursuant to Civil Local Rule 7-1(b), the Court found this matter appropriate for resolution without oral argument and vacated the hearing set for October 4, 2024.

BACKGROUND

Plaintiff 505 SFD, LLC owns 505 Sir Francis Drake Boulevard (the "Premises"), a commercial property in Greenbrae, California. Dkt. No. 1 ("Compl.") ¶ 2. First Republic Bank ("the Bank") leased the Premises from plaintiff beginning on January 4, 2023. *Id.* ¶ 5-7. The lease was set to expire approximately 10 years later. *Id.* ¶ 7. However, on May 1, 2023, the Commissioner of Financial Protection and Innovation of the State of California closed the Bank and appointed defendant, Federal Deposit Insurance Corporation ("FDIC"), as the Bank's receiver. *Id.* ¶ 8. As a result, FDIC assumed the Bank's responsibilities, including the lease of the Premises. *Id.*

Plaintiff attaches the lease agreement to the complaint. *Id.*, Ex. A. Relevant here are Articles

3.1, 4.1, 13.1, 18, and 19. Article 3.1 lists the monthly rent as \$23,000.00 and outlines a \$69,000.00 “Rent Abatement” and a “Rent Abatement Period.” Compl. Ex. A. at 5. Article 4.1.3 explains which party pays each tax. *Id.* at 6. Article 13.1 obligates the tenant to pay for utilities. *Id.* at 11. Article 18 defines events that constitute a default. *Id.* at 13-14. Article 19 lists the remedies if a default occurs. *Id.* at 14-15. Article 19.7 permits either party who prevails in an action arising out of or in connection with the lease to recover reasonable attorney’s fees and costs. *Id.* at 15.

Plaintiff alleges defendant, as receiver, was obligated to pay the full amount of monthly rent due under the lease and has failed to do so, thus breaching the agreement. Compl. ¶¶ 16, 21. On September 28, 2023, plaintiff submitted a Proof of Claim to defendant for \$1,338,093.49. *Id.* ¶ 12. On December 4, 2023, defendant issued to plaintiff a Notice of Repudiation of the lease as of December 4, 2023. *Id.* ¶ 13. On January 26, 2024, defendant issued a Notice of Partial Allowance of Claim for \$23,000.00 but disallowed the remaining \$1,315,093.49 of plaintiff's claim. *Id.* ¶ 14.

On March 21, 2024, plaintiff filed a complaint for commercial lease damages under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (“FIRREA”), 12 U.S.C. § 1821. Dkt. No. 1. Plaintiff seeks: unpaid base rent from September 29 to December 4, 2023 (\$50,600.02); unpaid additional rent for property taxes from September 29 to December 4, 2023 (\$11,146.68); unpaid additional rent for utilities/landscaping (\$2,986.50); abated rent (\$69,000.00); and attorney’s fees (in excess of \$10,000.00). *Id.* at 5. Plaintiff also requests 10% additional interest per year for all amounts past due. *Id.*

Defendant does not dispute that unpaid base rent, property taxes, and utilities/landscaping may be recoverable under FIRREA but moves to dismiss the request for abated rent, attorney's fees, and 10% interest, under Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 21 ("Mot.") at 5-6.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if

1 it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
2 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.”
3 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires
4 the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant has acted
5 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts do not require “heightened
6 fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the
7 speculative level.” *Twombly*, 550 U.S. at 544, 555.

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9 If the Court dismisses the complaint, it must then decide whether to grant leave to amend.
10 The Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no
11 request to amend the pleading was made, unless it determines that the pleading could not possibly
12 be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000)
13 (citations and internal quotation marks omitted).

15 DISCUSSION

16 Plaintiff sues under 12 U.S.C. § 1821. Compl. ¶ 21. Section 1821(e)(4) governs leases
17 inherited by the FDIC, where the banking institution was the lessee:

19 (4) Leases under which the institution is the lessee

20 (A) In general

21 If the conservator or receiver disaffirms or repudiates a lease under which the insured
22 depository institution was the lessee, the conservator or receiver shall not be liable
23 for any damages (other than damages determined pursuant to subparagraph (B)) for
24 the disaffirmance or repudiation of such lease.

25 (B) Payments of rent

26 Notwithstanding subparagraph (A), the lessor under a lease to which such
27 subparagraph applies shall—

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- (i) be entitled to the contractual rent accruing before the later of the date—
 - (I) the notice of disaffirmance or repudiation is mailed; or
 - (II) the disaffirmance or repudiation becomes effective,

1 unless the lessor is in default or breach of the terms of the lease;

2 (ii) have no claim for damages under any acceleration clause or other penalty
3 provision in the lease; and

4 (iii) have a claim for any unpaid rent, subject to all appropriate offsets and
5 defenses, due as of the date of the appointment which shall be paid in
accordance with this subsection and subsection (i).

6 12 U.S.C. § 1821(e)(4). The statute thus allows a lessor to recover “contractual rent” accruing
7 before the notice of repudiation. 12 U.S.C. § 1821(e)(4)(B)(i). The statute explicitly bars lessors
8 from recovering damages under a “penalty provision” in the lease. *Id.* §1821(e)(4)(B)(ii).

9 Defendant argues the requests for abated rent, attorney’s fees, and 10% additional interest
10 are impermissible penalties, barred by FIRREA or sovereign immunity. Mot. at 6. The Court
11 concludes plaintiff cannot recover abated rent or additional interest. However, attorney’s fees may
12 be recoverable under Ninth Circuit precedent.

15 **I. Abated Rent Provision**

16 At issue is whether the “abated rent” provision in the lease agreement is a “penalty
17 provision” (not recoverable under FIRREA) or a form of “contractual rent” (recoverable under
18 FIRREA). *See* 12 U.S.C. §1821(e)(4)(B). The Court is persuaded that the abated rent provision
19 here is a penalty provision. The motion to dismiss is thus granted as to the claim for rent abatement.

20 Plaintiff requests \$69,000.00 pursuant to the abated rent provision of the lease agreement
21 (Article 3.1).¹ Compl. ¶ 26. As relevant, Article 3.1 states:

22 ... Notwithstanding anything contained in this Lease to the contrary,
23 Landlord shall abate Monthly Base Rent for three (3) full calendar
24 months following the Commencement Date (“Rent Abatement
25 Period”) in the monthly amount of \$23,000.00 for a total sum of
26 Sixty-Nine Thousand and NO/100 Dollars (\$69,000.00) (the “Rent
27 Abatement”) as follows: the first full calendar month following the
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¹ Because the lease agreement is attached to the complaint, and is incorporated by reference
therein, the Court considers the lease at this stage without converting the motion to dismiss into a
motion for summary judgment.

1 Commencement Date; the thirty-six (36th) full calendar month of the
2 Term; and the sixtieth (60th) full calendar month of the Term... If an
3 Event of Default occurs during the Rent Abatement Period, then
4 Tenant shall be entitled to no further abatement of Monthly Base Rent
5 pursuant to this Section 3.1. If this Lease is terminated prior to the
6 expiration of the Term in connection with an Event of Default that
7 occurs any time from and after the Rent Abatement Period, then
8 Tenant shall pay to Landlord the unamortized balance of any Rent
9 Abatement credited against Monthly Base Rent.

10 Compl. Ex. A at 5. Plaintiff argues “the term ‘Abated Rent’ comprises of [sic] three months of
11 contractual rent for the ‘three months following the Commencement Date’ of January 4, 2023 – i.e.,
12 February 2023, March 2023, and April 2023.” Dkt. No. 27 (“Opp’n”) at 1 (citing Article 3.1).
13 Plaintiff alleges defendant thus owes \$69,000 pursuant to Article 3.1, representing the three months
14 of rent abatement credited in early 2023. *Id.*

15 Defendant argues the rent abatement provision is a penalty provision and therefore excluded
16 from recovery under FIRREA. Defendant argues the rent abatement provision is effectively “a
17 liquidated damages clause meant to account for lost future profits” because it is only charged if the
18 lease terminates following a default. Mot. at 5. Defendant also argues that only one month accrued
19 under this clause because the lease agreement lists the rent abatement periods as the 1st, 36th, and
20 60th full calendar months following the commencement date (January 4, 2023), and the lease
21 terminated after the 1st month but before the 36th month. Dkt No. 28 (“Reply”) at 3-4.

22 Though the parties disagree about how many months of rent abatement occurred, the Court
23 need not reach this factual dispute. The parties agree that the Bank received at least one month of
24 abated rent (for February 2023, totaling \$23,000.00). Thus, regardless of whether the abated rent
25 totaled one month or three months of rent, the Court is still tasked with determining whether abated
26 rent is allowable under FIRREA at all.

27 None of the parties’ citations directly address whether rent abatement provisions are
28 “punitive” for purposes of § 1821. One district court, examining various other lease provisions, has
explained the difference between “contractual rent” and “unpaid rent” (recoverable), and “penalty

provisions" (non-recoverable) as follows:

[R]ecover for "contractual rent," 12 U.S.C. § 1821(e)(4)(B)(i), which should be narrowly construed as "only . . . those sums that are fixed, regular, periodic charges," . . . expressly delineated in the lease may be recovered up until the later of either the date when the lessor received notice of the disaffirmance of the lease or the disaffirmance of the lease became effective, 12 U.S.C. § 1821(e)(4)(B)(i). Recovery for 'unpaid rent,' 12 U.S.C. § 1821(e)(4)(B)(iii), however, may only be recovered up to the "date of the appointment" of the receiver, *id.*, which necessarily occurs before the repudiation of the lease. While the FIRREA does little, if anything, to illuminate the subtle yet important differences between contractual rent and unpaid rent, it is quite clear that the FIRREA does not permit a lessor's recovery for future rents or penalties.

Qi v. F.D.I.C., 755 F. Supp. 2d 195, 201 (D.D.C. 2010) (citations omitted).

The Court is not persuaded by plaintiff's argument that the rent abatement repayment is "contractual rent." *Qi* suggests the term "contractual rent" must be "narrowly construed as 'only . . . those sums that are fixed, regular, periodic charges,' . . . expressly delineated in the lease" *Id.* (quoting *First Bank Nat'l Ass'n v. FDIC*, 79 F.3d 362, 369 (3d. Cir. 1996)) (emphasis added). Though the rent here was abated at fixed intervals, what accrued under the rent abatement provision was not a "charge" but, by definition, the lack of a charge. Under the lease here, the abated rent credited to the lessee is only repaid by the lessee if the lease is terminated in connection with a default. Additionally, plaintiff's own explanation of the rent abatement provision effectively describes a punitive provision. *See* Compl. ¶ 26. Plaintiff's description states, "Landlord agreed to Abate Rent in the amount of \$69,000, however, if the Lease is terminated prior to the expiration of the term in connection with an Event of Default, as is the case here, Tenant/Defendant agreed to pay to Landlord the unamortized balance of any Rent Abatement credited against Monthly Base Rent." *Id.* The Court has little difficulty under the facts here in finding that repayment of the abated rent is properly categorized as a "penalty" rather than as "contractual rent" owed.

In sum, plaintiff's argument that abated rent is recoverable under § 1821 is unpersuasive

1 because it does not fit the narrow definition of “contractual rent.”² *See Qi*, 755 F. Supp. 2d at 201.
 2 The rent abatement provision is instead a “penalty provision” designed to penalize the tenant for
 3 terminating the lease. The Court grants the motion to dismiss the claim for abated rent from the
 4 complaint because the relevant portion of FIRREA provides “no claim for damages under any . . .
 5 penalty provision.” *See* 12 U.S.C. § 1821(e)(4)(B)(ii).

7 II. Attorney’s Fees

8 Defendant moves to dismiss the request for attorney’s fees, arguing attorney’s fees are
 9 impermissible penalties under § 1821(e)(4). Mot. at 6. Plaintiff counters that “FIRREA provides
 10 what damages are recoverable” but “attorney’s fees and costs are not damages but a recoverable
 11 element of costs.” Opp’n at 2.

12 The Court denies the motion to dismiss the request for attorney’s fees. Attorney’s fees
 13 against the FDIC are not precluded as a matter of law in the Ninth Circuit, *see, e.g., Fed. Deposit*
 14 *Ins. Corp. v. Meo*, 505 F.2d 790, 793 (9th Cir. 1974), and the lease agreement here permits an award
 15 of reasonable attorney’s fees to the prevailing party. *See* Compl. Ex. A at 15 (Article 9.7).

16 The only case that defendant cites in its motion did not mention attorney’s fees. *See* Mot. at
 17 6 (citing *New Hampshire Assocs. Ltd. P’ship v. F.D.I.C.*, 978 F. Supp 650, 656-57 (D. Md. 1997)).
 18 In that case, the District of Maryland declined to award the lessor “late fees, which the lease
 19 designate[d] . . . as a ‘Late Payment Penalty.’” *New Hampshire Assocs.*, 978 F. Supp at 656-57.
 20 Defendant’s reply brief also cites *Monrad v. F.D.I.C.*, 62 F.3d 1169, 1175 (9th Cir. 1995). *See*
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 25 ² Plaintiff does not appear to argue that the abated rent is recoverable as “unpaid rent,”
 26 though at one point plaintiff uses the term “unpaid contractual rent.” *See* Opp’n at 2. If plaintiff is
 27 arguing that the abated rent should be considered “unpaid rent,” the Court likewise rejects this
 28 argument. Section 1821(e)(4)(B)(iii) permits recovery of “unpaid rent, subject to all appropriate
 offsets and defenses, *due as of the date of the appointment . . .*” 12 U.S.C. § 1821(e)(4)(B)(iii)
 (emphasis added). The abated rent repayment clause would not have been triggered until default,
 and it is undisputed that default had not occurred as of the date of the FDIC’s appointment.

1 Reply at 5. That case involved a different provision of FIRREA, 12 U.S.C. § 1821(d), where former
2 bank employees sought severance pay. There, the Ninth Circuit reversed the award of attorney's
3 fees to the plaintiffs, finding that federal common law controlled the state claims and that, “[u]nder
4 the American rule, generally applicable in federal litigation, each side shall pay its own attorney
5 fees.” *Monrad*, 62 F.3d at 1175 (quoting *Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374,
6 1379 (9th Cir. 1994)). Unlike in *Monrad*, however, here there is a contract providing for attorney's
7 fees to the prevailing party. *See* Compl. Ex. A at 15. It is well settled that the default “American
8 rule” can be overcome by statute or enforceable contract allocating attorney's fees. *Travelers Cas.*
9 & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 448 (2007). At minimum, the Court
10 cannot say at this early stage that attorney's fees are unavailable as a matter of law and therefore
11 denies the motion to dismiss the fee request.

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14 **III. 10% Additional Interest**

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16 Plaintiff's prayer for relief requests “[i]nterest at the rate of ten percent (10%) per year for
17 all amounts past due from the date they were due at the time of the award[.]” Compl. at 5. Defendant
18 argues sovereign immunity bars an award of interest against the FDIC. Mot. at 6. Plaintiff does not
19 directly address this argument in its papers but instead argues that the request for interest is not
20 subject to dismissal under Rule 12(b)(6) because it appears in the prayer for relief. Opp'n at 6.

21 The Court grants the motion to dismiss plaintiff's request for 10% additional interest because
22 sovereign immunity “generally bars an award of interest against a federal agency ‘unless Congress
23 affirmatively mandates that result[.]’” *Far West Fed. Bank, S.B. v. Office of Thrift Supervision-Dir.*,
24 119 F.3d 1358, 1366 (9th Cir. 1997) (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 316
25 (1986)); *see also Battista v. F.D.I.C.*, 195 F.3d 1113, 1120 (9th Cir. 1999) (confirming that *Far West*
26 held “that sovereign immunity bars an award of interest against the FDIC”). “Congress has never
27 expressly waived FDIC's immunity against prejudgment interest” but there is an exception when the
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1 government agency has “assumed the status of a commercial enterprise.” *Far West*, 119 F.3d at
2 1366. Unlike some other agencies such as the Postal Service, “the FDIC operates as a governmental,
3 regulatory entity, not as a private commercial enterprise.” *Id.* “[B]ecause FDIC is not a commercial
4 entity and because Congress has not explicitly waived its immunity against interest, FDIC is not
5 subject to a prejudgment interest award.” *Id.* at 1367. The Court will dismiss the request for ten
6 percent interest from the complaint.
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9 **CONCLUSION**

10 For the foregoing reasons and for good cause shown, the Court hereby GRANTS IN PART
11 and DENIES IN PART the motion to dismiss. The Court GRANTS the motion to dismiss the
12 request for abated rent and additional interest, without leave to amend, and DENIES the motion to
13 dismiss the request for attorney’s fees.
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15 **IT IS SO ORDERED.**

16 Dated: October 4, 2024



SUSAN ILLSTON
United States District Judge